No. 375

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 375

JULIUS BERNARD SHERMAN,
Petitioner,

vs.

JOSEPH E. RAGEN, WARDEN OF ILLINOIS STATE PENITENTIARY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PETITIONER'S BRIEF

NATHANIEL L. NATHANSON,
Counsel for Petitioner.

INDEX

Subject Index

	Page
Petitioner's Brief	
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Summary of argument	3
Argument	5
I. The allegations of the petition set forth substantial claims of denial of due process with respect to the truth of of which, as a matter of federal law, the petitioner was entitled to a hearing	6
II. The judgment of the Illinois Supreme Court may not properly be interpreted as resting upon an adequate state ground	6
Conclusion	11
	13

Citations

Cases Cited:

Bram v. *United States*, 168 U. S. 532, 541	6
Darr v. *Burford*, 339 U. S. 200, 203-204	7
Gibbs v. *Burke*, 337 U. S. 773, 779	7
Haley v. *Ohio*, 332 U. S. 596	7
Holiday v. *Johnston*, 313 U. S. 342, 350	7
Lee v. *Mississippi*, 332 U. S. 742, 745	7
Lyons v. *Oklahoma*, 322 U. S. 396, 597, n. 1	7
Malinski v. *New York*, 324 U. S. 401, 402	7
Mooney v. *Holohan*, 294 U. S. 103	9
People v. *Touhy*, 397 Ill. 19	11
Price v. *Johnston*, 334 U. S. 266, 291-292	7

Page

Pyle v. *Kansas*, 317 U. S. 213 9
Rice v. *Olson*, 324 U. S. 786, 791-792 7, 13
Steele v. *Louisville and Nashville R. R.*, 323 U. S. 192, 197, n. 1 13
Tompkins v. *Missouri*, 323 U. S. 485, 487 7
Williams v. *Kaiser*, 323 U. S. 471 13

STATUTES

Ill. Rev. Stats. 1949, Ch. 38, secs. 826-832 2
Smith-Hurd Ill. Ann. Stats., Ch. 38, secs. 826-832 2

ARTICLES

Jenner, The Illinois Post-Conviction Hearing Act; 9 F.R.D. 347, 358 (1950) 13

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Opinion Below

The Supreme Court of Illinois did not render any opinion apart from the order dismissing petition for writ of error which is set forth in full at page 21 of the Record. The order reads in part as follows: "It is further considered by the Court that after having examined and reviewed the petition and record in the post conviction hearing the same is found to disclose no violation or denial or any substantial

constitutional rights of the petitioner under the constitution of the United States or of the constitution of the State of Illinois, and the petition for writ of error on post conviction hearing is accordingly dismissed; also, petitioner granted leave to withdraw petition, if requested."

Jurisdiction

The judgment of the Supreme Court of Illinois was entered May 24, 1951 (R. 21). The petition for writ of certiorari was filed June 9, 1951 and was granted October 8, 1951. The jurisdiction of this Court rests on 28 U. S. C. section 1257(3).

Questions Presented

The questions presented are: (1) Whether the Illinois Supreme Court erred in holding that there was "no violation or denial of any substantial constitutional rights of the petitioner under the Constitution of the United States" resulting from the dismissal, without a hearing on the truth of the allegations, of a petition under the Illinois Post-Conviction Hearing Act which alleged that the petitioner had been deprived of his liberty without due process of law through the use of perjured testimony given by witnesses who had been bribed by state officials to testify falsely against the petitioner and through the use of an involuntary confession extorted by police officers; (2) Whether the judgment of the Illinois Supreme Court may be interpreted as resting upon an adequate state ground.

Statute Involved

The Illinois Post-Conviction Hearing Act (Ill. Rev. Stats., 1949, ch. 38, secs. 826-832; Smith-Hurd Ill. Ann. Stats., ch. 38, secs. 826-832) is set forth in full in Appendix A of petitioner's brief in *Jennings* v. *Illinois*, No. 95, October Term, 1951.

Statement

On July 25, 1950, petitioner, Julius Bernard Sherman, filed a petition in the Criminal Court of Cook County, State of Illinois under the Illinois Post-Conviction Hearing Act (R. 5-15), accompanied by a motion for leave to file the petition as a poor person without payment of costs on the ground that petitioner "is a poor person without sufficient funds to pay the costs of these proceedings or to give security therefor" (R. 4). On November 9, 1950, petitioner filed an amended petition adding certain allegations to the original petition (R. 17-18). The original petition stated that on October 29, 1947, the petitioner, together with a co-defendant, named Edgar Williams, was tried and convicted by the Court sitting without a jury, jury trial having been waived, on two separate indictments charging murder and robbery. Petitioner was sentenced to two concurrent terms of 30 years on the murder charge and 10 to 30 years on the robbery charge (R. 5).

According to the allegations of the petition, the petitioner was arrested at his place of employment, The W. F. Hall Printing Company, located at 4600 West Diversey Blvd., about 8:30 p m. on March 6, 1947 by four police officers and was taken to the 48th Street Police Station and was detained there on an open charge (R. 9). When arrested, petitioner was told he was wanted as an accomplice to one Willie Franklin, concerning a murder and robbery which had been committed. The police officers told petitioner that Willie Franklin was already in custody and under arrest, but petitioner was not brought face to face with Willie Franklin until about four days after petitioner's arrest. During those four days the police officers blackjacked, clubbed and kicked petitioner in efforts to make him confess. On March 10, 1947, or thereabouts, petitioner was confronted with Willie Franklin, who denied knowing him. On the third

night after his arrest, petitioner was compelled to present himself at a private "show-up" in the 48th Street Police Station before two men, one of whom the petitioner later learned was Hun Lee Booker, a porter employed at the Tulane Liquor Store, who was supposed to have been in the store on January 10, 1947 with George Bloom, when two armed men entered the store for the purpose of the robbery which culminated in the shooting of Mr. Bloom. Although the police pointed to petitioner as one of the men who helped rob and kill George Bloom, the porter, Hun Lee Booker, did not then identify petitioner as one of the participants in the crime (R. 10). Thereafter, the police officers continued to beat and abuse the petitioner for three more days in order to induce him to confess and also continued to hold him on open charges and to deny him the opportunity of communicating with friends and relatives or obtaining an attorney.

On the seventh day after the petitioner's arrest, Hun Lee Booker, the porter, and Harold Bloom, son of the slain man, George Bloom, were brought to the 48th Street Police Station to listen to the reading of a confession supposed to have been made by petitioner, one Williams and Willie Franklin (R. 10).

Petitioner was tried with a co-defendant, Edgar Williams, on charges of having murdered George Bloom on January 10, 1947 in the liquor store owned by Bloom. At the trial, two witnesses, Miss Classie Mann and Hun Lee Booker, testified for the State against petitioner (R. 7, 8, 12). Upon cross-examination both witnesses testified they were being paid to testify (R. 8, 12).

The petition also sets forth that petitioner has previously filed an original petition for a writ of habeas corpus in the Criminal Court of Cook County, Illinois, and that this petition was denied on motion of the State's Attorney without

a hearing inquiring into the truth or falsity of the allegations (R. 13). The petitioner then filed in this Court a petition for writ of certiorari; the petition was granted and the order of the Criminal Court of Cook County denying the petition for the writ of habeas corpus was vacated. After the remand and after argument in the Criminal Court of Cook County, Illinois, the petition was dismissed on the ground that habeas corpus was not the proper remedy. Thereupon a petition for certiorari was filed in this Court on January 29, 1950 (R. 14). In the petition this Court was advised of conflicts in the courts of Illinois concerning the constitutionality of the Illinois Post-Conviction Hearing Act and was requested to withhold action on the petition for certiorari until the constitutionality of the statute was determined by the Illinois Supreme Court. In May 1950, the statute was declared constitutional by that Court (R. 13-14).

In response to the petition the State's Attorney of Cook County moved to strike the petition and to dismiss the proceedings (R. 15). After the filing of the amended petition, the State's Attorney moved to strike the additional allegations and again asked for dismissal of the proceeding. On February 15, 1951 the Court entered an order sustaining the State's Attorney's motion and dismissing the petition.

On March 22, 1951, petitioner filed a petition for writ of error in the Illinois Supreme Court (R. 1-3) and on May 24, 1951 the Illinois Supreme Court entered its order dismissing the petition.

ARGUMENT.

I. The Allegations of the Petition Set Forth Substantial Claims of Denial of Due Process With Respect to the Truth of Which, as a Matter of Federal Law, the Petitioner Was Entitled to a Hearing.

The petition originating this proceeding, though artlessly drawn, nevertheless provides a circumstantial account of the way in which the petitioner was denied due process in the conduct of his trial. The allegations show clearly that the petitioner was held under illegal detention for at least seven days, during which time he was deprived of the aid of friends, relatives and counsel, and subjected to extreme physical brutality, as well as continued questioning, until a confession, apparently satisfactory to the police officers, was secured. The statement filed by the Attorney General in response to the petition for certiorari suggested that all this was irrelevant since the confession contained the statement, "I would rather not sign the statement because it is not true." (R. 11), and because "there can be no presumption that the judge based the court's conviction and sentence in whole or in part on this statement."

This suggestion is based on erroneous assumptions of both fact and law. The fact that the confession contained one statement in which the petitioner sought to disavow its effect does not prove that there were not other equally positive statements in the document by virtue of which petitioner ostensibly adopted the confession as his own. Indeed the very fact that the document was offered in evidence against petitioner shows that the prosecution was satisfied that it contained enough damaging statements to warrant its submission in evidence. As this Court said in *Bram* v. *United States*, 168 U. S. 532, 541; "the prosecution cannot on the one hand offer evidence to prove guilt, and which

by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequences of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt." The petitioner's obvious misapprehension in thinking that he aided his cause by quoting only that part of the confession which cast doubt on its authenticity does not negate this principle. Pleadings drawn by unlettered prisoners are not thus strictly to be construed as if they were the work of skilled draftsmen. *Holiday* v. *Johnston*, 313 U. S. 342, 350; *Tompkins* v. *Missouri*, 323 U. S. 485, 487; *Rice* v. *Olson*, 324 U. S. 786, 791-792; *Price* v. *Johnston*, 334 U. S. 266, 291-292; *Gibbs* v. *Burke*, 337 U. S. 773, 779; *Darr* v. *Burford*, 200, 203-204.

There is also no basis for the further suggestion of the Attorney General that there can be no presumption that the conviction was based in whole or in part on the statement offered by the state as a confession. This Court has several times made it clear, that the existence of evidence, entirely aside from the coerced confession, sufficient to sustain the conviction, does not cure the violation of due process arising from the introduction of a coerced confession. See *Lyons* v. *Oklahoma*, 322 U. S. 596, 597, n. 1; *Malinski* v. *New York*, 324 U. S. 401, 402; *Haley* v. *Ohio*, 332 U. S. 596, 599; *Lee* v. *Mississippi*, 332 U. S. 742, 745. The fact that the trial here was before a judge without a jury does not render the reason for the rule any the less applicable, for this Court could hardly undertake to say how significant a part the confession itself played in the process of decision. It is enough to invoke the protection of the due process clause that the confession was offered by the state and admitted by the court to be accorded such weight as the trier of the facts might be disposed to give it.

Nor is there any additional reason for holding this principle inapplicable because the trial judge, according to the allegations of the petition, indicated that he would "throw the case out of his court room" unless the state produced some witnesses against the petitioner (R. 11). The mere fact that the trial judge insisted upon some corroboration for the confession does not mean that he had decided not to give any weight at all to the confession itself if it were corroborated by other evidence. There is nothing in the facts stated to distinguish this case from the usual situation of two pieces of evidence, neither of which is alone sufficient to support a conviction, but both of which are entitled to some weight. And it is certainly no cause for surprise that the trial judge, in a murder case, should insist upon some corroboration for a confession, irrespective of whatever doubts he might have had with respect to the voluntary character of the confession. Even conceding that the trial judge might have harbored doubts with respect to voluntary character of the confession, that is far from establishing that he was unprepared to give it some weight if some corroboratory evidence were produced.

But it is artificial to speak of the other evidence in this case as if it could be entirely divorced from the voluntary or involuntary character of the confession. From the allegations of the petition, it appears that the most damaging evidence against petitioner, aside from the confession, was the testimony of Hun Lee Booker, who identified petitioner as one of the robbers. But it was Hun Lee Booker who prior to the trial was unable to identify petitioner as one of the robbers, even at a private show-up, but who was finally persuaded by the police, when they were able to produce the confession which they had extorted, that petitioner was one of the robbers. Thus both the confession itself and the major corroborating evidence were the inter-

connected fruits of the same course of illegal conduct by the police officers, and the state's use of the testimony of Booker was as offensive to the fundamental tenets of fairness embodied in due process as was the use of the coerced confession itself. Under such circumstances, it is particularly unrealistic for the Attorney General to suggest, as he did in his response, that the petitioner did not allege that the police officers knew that the testimony of Booker was false. The whole purport of the petition is that the police officers, without regard for truth or their obligations of fairness, deliberately manufactured the evidence against petitioner, and as part of that manufactured evidence, persuaded Booker to testify that petitioner was one of the robbers, when they well knew that Booker had previously been unable, on the basis of his own observation, to identify the petitioner. In this posture of the case, it is immaterial whether the money paid to the witnesses for testifying was really a bribe or as the Attorney General suggests, merely the compensation customarily paid to "recompense witnesses, particularly those in straitened financial circumstances, for their time, transportation, and loss of earnings in testifying." Irrespective of what part financial inducements may have played in refreshing Booker's recollection, the allegations were sufficient to make out a prima facie case of evidence deliberately manufactured by the police and used by the prosecution for the purpose of securing a conviction. Thus the entire picture is one of fundamental unfairness for which officials of the state were clearly responsible, and against which the protection of due process clause may properly be invoked under the principles of *Mooney* v. *Holohan*, 294 U. S. 103, and *Pyle* v. *Kansas*, 317 U. S. 213.

It remains only to consider the ground advanced in the State Attorney's motion to dismiss the petition that the

"allegation of coercion be stricken for the reason that this claim was litigated at his trial and decided against him, the issue therefore being res judicata and petitioner therefore being barred from obtaining—and the Court having no jurisdiction to grant or to use as a basis for relief to petitioner—another hearing on the same issue and the same or cumulative evidence" (R. 19). The Attorney General, in his response, did not suggest the same ground, perhaps because there is nothing in this record which affirmatively esfablishes that the claim of coerced confession was indeed litigated and determined at the original trial, although there is some suggestion to that effect in the reference to the doctor's testimony (R. 11). Be that as it may, the argument developed at length under Point I in the Brief for Petitioner in *Jennings* v. *Illinois*, No. 95 October Term 1951, is relevant here and is incorporated herein. As suggested there, there is no hard and fast principle of federal law justifying the application of the doctrine of res judicata to a claim of deprivation of liberty without due process of law presented in a post-conviction proceeding, particularly where, as in Illinois, the cost of the transcript presents a formidable obstacle preventing an impecunious defendant from securing direct review of questions of fact such as that of a coerced confession.

It is true that this petitioner does not specifically allege that he has been unable to afford the cost of the transcript. However, he did allege, in connection with the filing of the original petition under the Post-Conviction Hearing Act, that "he is a poor person without sufficient funds to pay the cost of this proceeding or to give security therefore" (R. 4). In the light of this allegation there can be no doubt that he was also unable to pay the much greater costs of obtaining the transcript of the record for the purposes of filing a bill of exceptions in connection with a writ of error to review his conviction. If the argument advanced in peti-

tioner's brief in the *Jennings* case with respect to the cost of the transcript is sound, this petitioner should not be deprived of the benefits of that argument simply because he did not fashion his allegations in the exact form which would have best fitted the argument. It should be sufficient that he is clearly one of those persons belonging to the class which would be directly affected by the kind of obstacle which the cost of the transcript in Illinois presents.

II. The Judgment of the Illinois Supreme Court May Not Properly Be Interpreted as Resting upon an Adequate State Ground.

The Attorney General also suggested in his response that the judgment of the Illinois Supreme Court should not be disturbed because it may have rested on the ground that the petition did not comply with section 2 of the Illinois Post-Conviction Hearing Act which provides: "The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." The Attorney General suggests that this ground is consistent with the statement incorporated in the judgment of the Court that "after having examined and reviewed the petition and record in the post-conviction hearing the same is found to disclose no violation or denial of any substantial constitutional rights of the petitioner under the Constitution of the United States or of the Constitution of Illinois."

The Attorney General in effect concedes that this is a tortured reading of the language of the judgment, but nevertheless finds support for his position in the opinion of the Illinois Supreme Court in *People* v. *Touhy*, 397 Ill. 19, where the Illinois Court explicitly stated that the allegations regarding perjury in a motion in the nature of a writ of error coram nobis, need not be accepted as true in

the absence of supporting affidavits because they were mere conclusions of the pleader. But in the *Touhy* case the allegations, as the court pointed out, related to matters outside the personal observation of the petitioner, quite unlike the allegations in this petition. For example, even the Attorney General apparently recognizes that the same reasoning could not be applied to the allegations herein, regarding the coerced confession, since they are based on a circumstantial account of events within the knowledge of the petitioner, as set forth in his verified petition. The petitioner could hardly be expected to produce affidavits from the police officers involved but he does suggest that corroboration might be found in the testimony of the doctor (R. 11). Furthermore, the allegations with respect to the false testimony deliberately induced by the police are also based on the observations of the petitioner as set forth in his verified petition—namely the failure of the witness Booker to identify petitioner at the show-up and the insistence of the police to Booker that petitioner was the man, as evidenced by his confession. Such allegations are clearly not on a par with those involved in the *Touhy* case.

But the major distinction is that in the *Touhy* case the Illinois Supreme Court expressly rested on state grounds whereas in the present case the judgment was expressly rested on federal grounds. Even if there were any room for doubt on the basis of the language in the judgment, it should be dispelled by the fact that exactly the same language was used in the judgments in the *Jennings* and *La Frana* cases, where the petitions clearly complied with the formal requirements of the statute and the Attorney General did not suggest, in his response, that the judgments rested on state grounds. Moreover, it is our understanding that when the Illinois Supreme Court has meant to say that the petition for writ of error was being dismissed on account

of failure to comply with the Post-Conviction Hearing Act, it has placed the dismissal on the ground that the petition has been "found insufficient" and added that the judgment was "without prejudice" apparently, so as to avoid the likelihood that the lower court would regard the dismissal as a bar to a second petition. *Cf. Jenner*, The Post-Conviction Hearing Act, 9 F. R. D. 347, 358 (1950). It is one thing to suggest that a state court judgment may rest on adequate state grounds when no grounds are stated, but quite another thing to make the same suggestion when federal grounds are explicitly stated. See *Steele* v. *Louisville and Nashville R. R.*, 323 U. S. 192, 197, n. 1. In *Williams* v. *Kaiser*, 323 U. S. 471, and *Rice* v. *Olsen*, 324 U. S. 786, there may have been room for difference of opinion in the proper application of this well established principle, since the language of the state court's judgment did not expressly refer to federal as distinguished from state grounds. But here the Illinois Supreme Court has expressly found no merit in the claims of federal right. There is therefore no room for reliance on grounds of state law to support the judgment.

Conclusion

Petitioner is entitled to a hearing on the truth of his allegations with respect to the use of a coerced confession and perjured testimony to secure his conviction. Because the Illinois Supreme Court, on grounds of federal law, denied him such a hearing, its judgment should be reversed.

Respectfully submitted,

NATHANIEL L. NATHANSON,
Counsel for Petitioner.